Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

LARRY FLYNT doing business as HUSTLER CASINO and NORMANDIE CASINO a partnership,

Petitioners,

v.

THE CALIFORNIA GAMBLING CONTROL COMMISSION; and BILL LOCKYER, Attorney General of California,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has ruled that whether or not equal protection rights are violated by Congressional action which grants preferences to American Indians not granted other Americans is to be determined by the use of the rational basis test rather than the strict scrutiny test if the different treatment involves uniquely Indian interests. *Morton v. Mancari*, 417 U.S. 535 (1974).

The Indian Gaming Regulatory Act (IGRA) 25 U.S.C. §§ 2701, *et seq.* allows a State to pass laws legalizing banked card games and slot machines (Class III games) on Indian trust land within that State if the state "permits such gaming for any purpose by any person, organization or entity"

This case presents two questions:

(1) Whether Congress Intended Through the Indian Gaming Regulatory Act To Authorize a State to Create a Gambling Regulatory System Which Legalizes Class III Commercial Gambling for Indians While Prohibiting Non Indians from Engaging in the Same Commercial Activity;

(2) What Constitutional Test Should Be Used To Determine Whether Or Not The Equal Protection Rights of Non Indian Citizens Are Violated By Laws Providing Indians With Monopolies Over Gambling or Other Commercial Enterprises By Imposing Criminal Sanctions on Non Indians Engaging in the Same Commercial Activity.

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Petitioners Larry Flynt d.b.a. Hustler Casino and Normandie Casino pray that a writ of certiorari will issue to review the judgment of the courts below which denies them their right to equal protection of the law under the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is published as 104 Cal. App. 4th 1125 a copy is attached as Appendix A to this Petition. The order of the Superior Court for the State of California granting respondents demurrer to petitioners' complaint for declaratory relief is attached as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was issued on December 26, 2002. Petitioners' petition for review before the California Supreme Court was denied on April 9, 2003. (App. C)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 25 U.S.C. § 2710(d)(1) which provides:

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are —

(A) authorized by an ordinance or resolution that —

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

This case also involves Article 4 § 19 of the California Constitution and California Penal Code Sections 330, 330A and 330B which are attached as Appendix D.

STATEMENT OF THE CASE

I. Procedural

Petitioners who own licensed gambling establishments in California filed a first amended complaint for declaratory relief on November 26, 2001 alleging that petitioners' right to equal protection of the law under the Fourteenth Amendment to the United States Constitution was violated by California law subjecting them to criminal sanctions for offering banked card games and slot machines which may legally be offered by Indian casinos in California.

Respondents demurred. The Superior Court sustained the demurrer on March 14, 2002. (Appendix C) Notice of appeal was filed on March 18, 2002. The Court of Appeals sustained the demurrer in an opinion filed on December 26, 2002. (Appendix A) Petitioners did not seek reconsideration of the court of appeals ruling. The California Supreme Court denied petitioners petition for review on April 9, 2003. (Appendix B)

II. Facts

Petitioners are non Indians who operate businesses known as gambling establishments which are licensed pursuant to California law. Petitioners are subject to the jurisdiction of the California Gambling Control Commission and the Division of Gambling Control which is a unit of the California Department of Justice responsibility for the operation of which lies with Bill Lockyer, Attorney General of California ("respondents").

Respondents allow petitioners to only offer non banked gambling games which are approved and authorized by respondents. Petitioners are not allowed by respondents to conduct or operate banked games or slot machines on the grounds that such gambling games violate Penal Code Sections 330, 330a, and 330b.

The adoption of Proposition 1A in March, 2000 amended Section IV, Article 19 of the the California Constitution to grant American Indians who have formed federally recognized Indian tribes the exclusive right to operate businesses offering banked card games and slot machines ("Class III gaming"). As of the filing of the First Amended Complaint there were 43 casinos owned by tribal Indians which had entered into agreements with the State of California authorizing them to offer Class III gaming to the general public throughout California. These agreements ("compacts") provide that the State of California has jurisdiction to enforce state gambling laws relating to the operation of casinos owned by tribal Indians.

Respondents do not enforce the provisions of Penal Code Sections 330, 330a, and 330b against casinos owned by tribal Indians which are allowed by respondents to offer Class III gaming to the public. Respondents do enforce the provisions of Penal Code Sections 330, 330a, and 330b against petitioners. If petitioners attempt to offer such games they are subject to the imposition of criminal and administrative sanctions by respondents.

Petitioners directly compete with tribal Indian owned casinos for patrons. Class III gaming is more attractive to the gambling market than the non banked card games which petitioners are allowed to offer. Respondents' enforcement

of Penal Code sections 330, 330a, and 330b and failure to enforce these statutes against tribal Indian casinos results in competitive and economic advantage being given to casinos owned by tribal Indians. This advantage threatens petitioners ability to continue in business.

Petitioners desire to offer and are able to offer Class III gaming to the public, and do not do so only because of the threat of sanctions imposed by respondents or criminal prosecution initiated by respondents.

Petitioners contend that respondents enforcement of laws prohibiting them to offer Class III gambling is based upon the fact that they are not Indians.

III. Legal Overview

Petitioners' first amended complaint for declaratory relief alleged that California Penal Code Sections 330, 330a and 330b which prohibited petitioners from offering commercial gambling involving banked games and slot machines violated petitioners' Fourteenth Amendment right to equal protection under the law. Petitioners alleged that the application of these statutes to them violated their equal protection rights because of the enactment of Article 4 § 19(f) of the California Constitution allowing California Indian tribes to offer such commercial gambling games (Class III). *Flynt v. Comm.*, 104 Cal. App. 4th 1125, 1129 (2002).

Petitioners argued that respondents did not have authority to create a dual system under the Section 2710(d)(1) of (Indian Gaming Regulatory Act (25 U.S.C. §§ 1701, *et seq.*) which authorized Class III gaming on Indian lands because that section allowed such gaming only in States in which

state law also "permits" other persons who are not tribal Indians to engage in the same commercial gaming activity.

Petitioners also argued that regardless of the intent of Section 2710(d)(1) laws which prosecuted them for engaging in activities which were made legal for tribal Indians violated Petitioners rights to equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution.

The Superior Court granted respondents demurrer to petitioners complaint without a written opinion.

On appeal the Court of Appeals rejected petitioners' contentions holding that

> 1. IGRA allowed a State to establish a system regulating gambling which allowed only Indians to offer Class III gaming within the State; *Flynt v. Comm.*, 104 Cal. App. 4th 1125, 1140.
>
> 2. Petitioners' equal protection rights were not violated by such a system because
>
> > We conclude that the challenged tribal-state compacts, granting Indians the exclusive right to conduct Class III gaming in California pursuant to the IGRA, is rationally related 'to the fulfillment of Congress' unique obligations toward Indians' and therefore passes constitutional muster under the rational basis test (*Mancari*, *supra*, 417 U.S. at p. 555). . . .

Flynt v. Comm., *supra*, 104 Cal. App. 4th 1125, 1145.

REASONS FOR GRANTING THE PETITION

This Case Involves two Important Question of Federal Law Which Should be Resolved by this Court Because They Have Major Impacts upon the Economic, Social and Political Relationship Between American Indians and Other Americans as Well as Impacting the Scope of the Right to Equal Protection Under the Law Guaranteed to All Americans.

These questions are:

1. Whether Congress Intended Through the Indian Gaming Regulatory Act To Authorize a State to Create a Gambling Regulatory System Which Legalizes Class III Commercial Gambling for Indians While Prohibiting Non Indians from Engaging in the Same Commercial Activity;

2. What Constitutional Test Should Be Used To Determine Whether Or Not The Equal Protection Rights of Non Indian Citizens Are Violated By Laws Providing Indians With Monopolies Over Gambling or Other Commercial Enterprises By Imposing Criminal Sanctions on Non Indians Engaging the Same Commercial Activity

I. Introduction

The commercial Indian gambling industry has been created and fostered by Congress through the enactment of the Indian Gaming Regulatory Act (IGRA) 25 U.S.C. §§ 2701, *et seq*. The commercial Indian gambling industry is one of the nations fastest growing industries.

Golden, "Casting a New Light On Tribal Casino Gaming," 84 Cornell L. Rev. 798, 800 (1999). As commercial Indian gambling expands in scope and influence it competes with non Indian commercial gambling activities which do not benefit from the protections and preferences granted Indian gaming by Congress.

In its decision the California Court of Appeals interpreted Section 2701(d)(1) of IGRA as allowing the State of California to enact laws legalizing Class III gaming by tribal Indians while imposing criminal sanctions on non Indians engaging in the same activity. Petitioners submit that this interpretation is not supported by the plain language of that section. IGRA's requirement that non Indians also be allowed to offer Class III gaming has the effect of ensuring that the equal protection rights of non Indians are protected. By negating this effect of IGRA the Court of Appeals ruling places equal protection rights in jeopardy. This Court should grant certiorari to ensure that Section 2701(d)(1) is properly interpreted and applied.

The Court of Appeals interpretation of this Court's equal protection criteria in *Morton v. Mancari*, 417 U.S. 535 (1974), so dilutes the criteria used in the *Mancari* case as to place virtually no constitutional restraints over laws which treat Indians and non Indians differently in granting of commercial preferences to wealthy Indian tribes and their commercial sponsors. The impact of the Court of Appeals ruling is to deprive non Indians of their equal protection rights as regards commercial privileges provided to American Indians.

This Court should grant certiorari to clearly establish the criteria for protecting the equal protection rights of non Indians in the context of the granting of commercial business

preferences to Indians. Non Indians should not be treated by States as criminals for engaging in commercial activities such as gambling which are expressly made legal for tribal Indians.

II. Certiorari Should be Granted to Correct the Lower Courts Erroneous Interpretation of IGRA

The Court of Appeals found that Congress in enacting IGRA intended to allow a State to authorize an Indian monopoly over Class III gaming within a state. *Flynt v. Comm.*, *supra*, 1140. In so doing the Court of Appeals upheld California's dual application of the law which imposes criminal sanctions upon non Indians for engaging in a commercial venture which is legal for Indians. Petitioners submit that this interpretation of Federal law is contrary to the plain language of the relevant section of IGRA.

The plain language of 25 U.S.C. 2710(1)(d)(B) is controlling. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1996).

The relevant language reads

> (1) Class III gaming activities shall be lawful on Indians lands only if such activities are. . . .
>
> > (B) located in a State that permits such gaming for any purpose by any person, organization, or entity. . . .

The Court of Appeals found this language to be "ambiguous" *Flynt v. Comm.*, *supra*, 1139. The Court concluded that a State met the "permits" requirement if it permitted Indian tribes to engage in Class III gaming.

Petitioners submit that the Court of Appeals erred. The first rule of statutory construction is to determine the clear meaning of the statute. In this case that meaning is clear from the face of the statute The "permits" language is not ambiguous but clearly requires that before a state may authorize Class III Indian gambling it must also allow persons, organizations or entities within the state to engage in that same activity.

The State does not have jurisdiction over Indians. Only Congress can permit gambling on Indian lands. *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 500-501 (1979). As the result Congress' use of the word "permits" as it relates to a state necessarily refers to persons, entities, or organizations over which a State has jurisdiction i.e. non Indians within the State.

This reading of Section 2701(1)(d)(B) is consistent with the protection of the equal protection rights of non Indians regarding such commercial activities. It is also consistent with the fact that no where in IGRA does Congress refer to the establishment of a monopoly over commercial gambling on behalf of Indians.

III. Certiorari Should be Granted to Clearly Define the Equal Protection Standards Which Apply to Disparate Treatment of Indians and Non Indians regarding Commercial Business Activities

In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court established a standard for evaluating equal protection challenges to discriminatory actions taken against non Indians in favor of American Indians. This Court determined that discriminatory treatment which dealt with uniquely Indian

interests such as Indian governance would be viewed as political rather than racial preferences and would be found constitutional if rationally related to Congress' obligation to assist American Indians.

Reprising the *Mancari* ruling in the more recent case of *Rice v. Cayetano*, 528 U.S. 495 (2000), this Court noted that *Mancari* involved a "limited exception" relating to tribal self governance, and refused to extend its rationale to a voting scheme in which only native Hawaiians were allowed to vote in a statewide election. This Court noted that the elections in question were not an internal tribal matter but "are the affair of the state of Hawaii" and that to extend *Mancari* to that context would be to allow a state to use a racial classification to exclude many of its citizens from voting. *Rice*, *supra*, 520-522.

Other rulings issued by this Court have cited *Mancari*, and its concept of political versus racial classifications in the content of the jurisdiction of tribal courts as opposed to state courts on a reservation *Fisher v. District Court*, 424 U.S. 382 (1976); in validating federal criminal law jurisdiction over enrolled Indians on a reservation *United States v. Antelope*, 439 U.S. 64 (1977); and in validating state assertion of criminal law jurisdiction over some but not all Indian reservations within the State pursuant to Congressional authorization. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 429 U.S. 463 (1979).

None of these cases involve the issue raised in this case which is whether or not the political classification rational applies to situations involving commercial business activities which market to and impact entire regions or states.

None of these case involve the granting of a statewide monopoly to Indians over such a commercial activity, or laws making the vast majority of the citizens of a state criminals if they engage in the same activities.

This case does involve these issues.

At the time of the filing of the complaint in this case there were 62 Indian tribes in California alone with the right to open gambling casinos offering slot machines and banked card games in California. There were no non Indian owned casinos offering the same types of games because it is illegal in California for a non Indian to own or operate such a casino. Any non Indian, regardless of race or ethnic background, who attempts to operate a casino offering banked card games or slot machines is subject to criminal prosecution under California law.

In its analysis, the California Court of Appeals held that the economic monopoly, enforced by criminal sanctions, over class III commercial gambling granted to American Indians by California resulted in a monetary benefit to tribes and their members. The Court went on to find that because of this monetary benefit the *Mancari* rationale basis test applied, and that raising revenues for American Indians was rationally related to Congress's obligations toward Indians. Applying this test to facts before it the Court of Appeals found that petitioners' equal protection rights were not violated.

The problem with this approach to applying the *Mancari* test is that it results in no test at all. If the fact that a commercial monopoly, preference or advantage given American Indians results in monetary gain for them is sufficient to render the classification political and bring into

play the rational basis test, then any such discrimination, regardless of how remote from unique Indian interests or how draconian the sanction used to enforce it, will pass constitutional muster. Every such situation will comply with Congress' obligation to assist American Indians because raising monetary revenues for American Indians will always help them.

The California Court of Appeals is not the only court to apply *Mancari* as if it creates what amounts to an automatic default in favor of discrimination against non Indians if there is a commercial benefit to Indians.

The United States District Court for the Eastern District of California came to a similar conclusion regarding a challenge to the Constitutional validity of Article 4, § 19 of the California Constitution. *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal. 2002).

A similar rationale relating to construction contracts was expressed by the a Ninth Circuit panel in *Alaska Chapter, Associated General Contractors v. Pierce*, 694 F.2d 1162 (9th Cir. 1982).[1]

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1. The sole case of which petitioners are aware which appears to recognize the limited exception established by *Mancari* is the case of *Williams v. Babbit*, 115 F.3d 661 (9th Cir. 1997). In the *Williams* case a panel of the Ninth Circuit stated in dicta that *Mancari* is limited to "shielding only those statutes that affect uniquely Indian interests. . . . [We] seriously doubt that Congress could give Indians a complete monopoly on the casino industry or in Space Shuttle contracts." *Williams*, *supra*, 665.

The California court of Appeals distinguished the *Williams* case on the grounds that it did not refer to IGRA.

Petitioners ask this Court to grant Certiorari in this case so as to resolve this national issue. Sound public policy requires that the constitutionality of laws granting a statewide monopoly over a lucrative economic enterprise to tribal Indians enforced by criminal sanctions on non Indians be reviewed. This Court should enunciate clear criteria for protecting the rights of Americans of all races and ethnic backgrounds in the context of IGRA and Congress' special relationship to Indians and Indian tribes.

As this case illustrates, without such a clear statement from this Court, the rights of the vast majority of Americans risk continued erosion at the hands of courts which find no limits to the discrimination which may be imposed on most Americans. This is done in the good faith pursuit of righting wrongs done to American Indians in the past. However, as well intentioned as such efforts may be, they erode fundamental rights essential to maintaining a free society. Like good intentions the road to the loss of fundamental freedoms is paved with such efforts.

CONCLUSION

For the reasons stated above the petition for certiorari should be granted in this case.

Respectfully Submitted,

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